FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6568

JOHNNIE B. HANKERSON,

Petitioner,

v.

THE STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

REPLY BRIEF OF PETITIONER

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CONSTITUTIONAL PROVISION INVOLVED
CONSTITUTION OF THE UNITED STATES, AMENDMENT *XIV*

"§. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Should this Court review the North Carolina Supreme Court's definition of its law as it applies to proof to the "satisfaction of the jury"?

ARGUMENT

THE SUPREME COURT OF NORTH CAROLINA PROPERLY DEFINED AND INTERPRETED THE TERM "TO THE SATISFACTION OF THE JURY" AS IT RELATED TO THE LAW OF NORTH CAROLINA, AND THERE ARE NO EXTREME CIRCUMSTANCES WHICH WARRANT A REVIEW OF THAT DEFINITION AND INTERPRETATION BY THIS COURT.

In the brief of the respondent (Argument III, p. 15), respondent argues at length, as it did in its brief in opposition to the Petition for Writ of Certiorari, that the Supreme Court of North Carolina erred in holding that by reason of the decision in *Mullaney v. Wilbur* 421 U.S. 684 (1975) the due process clause prohibits the use of North Carolina's longstanding rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The Petition for Writ of Certiorari addressed itself solely to the question of whether the Supreme Court of North Carolina should have given *Mullaney v. Wilbur* retroactive effect in North Carolina.

Petitioner believes that the Supreme Court of North Carolina properly addressed itself at the first opportunity to the question of the applicability of *Mullaney v. Wilbur* to the North Carolina law regarding the burden of proof in homicide cases, and that the Supreme Court of North Carolina recognized the immediate necessity of changing the law of North Carolina in order to comport with due process. Petitioner brought his Petition for Writ of Certiorari for a determination of the pressing question of "retroactivity" raised by the North Carolina Supreme Court's refusal to apply *Mullaney v. Wilbur* retroactively "without further guidance from the [United States] Supreme Court. . .", *State v. Hankerson*, 288 N. C. 632, (1975) at 652 (A. 27). Nevertheless, petitioner will, arguendo, address himself to the question of whether this Court should review the applicability of *Mullaney v. Wilbur* to the law in North Carolina as it stood prior to *State v. Hankerson*.

Respondent acknowledges in its brief that "ordinarily, the state court's definition of its law will be binding" (p. 13, Note 37). The respondent then cites *Bouie v. City of Columbia*, 378 U.S. 347 (1964) as authority for the proposition that the state court's definition of its law will not be binding in "extreme circumstances." (Brief of Respondent p. 13, Note 37). In *Bouie* two black defendants refused to leave a booth in the restaurant department of a drug store, although requested to do so by the store manager. They were convicted in a South Carolina state court of having violated a statute making it a misdemeanor to enter another's lands after notice from the owner or tenant prohibiting such entry. The Supreme Court of South Carolina affirmed the defendants' conviction, the South

Carolina court holding that the terms of the statute which made it a criminal offense *to enter* lands of another after notice from the owner prohibiting such entry, covered the act of *remaining* on the premises after receiving notice to leave. The Supreme Court of the United States reversed, holding that the convictions violated the due process clause of the Fourteenth Amendment in view of the fact that it was not until after the commission of the alleged offense that the South Carolina Supreme Court construed the statute to cover the act of *remaining* on the premises after receiving notice to leave. The Court in *Bouie* stated that an unforeseeable and unsupported state court decision on a question of state procedure does not constitute an adequate ground to preclude United States Supreme Court review of a federal question. Respondent herein does not cite any other authority for the proposition that this Court should review that part of the decision of the Supreme Court of North Carolina which, based upon *Mullaney v. Wilbur*, found the previous rule in North Carolina placing the burden of proof on the defendant to be violative of due process.

Respondent does not state what "extreme circumstances" exist in the case at bar to warrant review of the state court's construction and definition of the term "satisfaction of the jury" by this Court. If any "extreme circumstances" existed in *Bouie* to warrant review by the Supreme Court of the United States, petitioner contends those extreme circumstances were the deprivation of the due process rights of the defendants in that case by the unforeseeable judicial enlargement of a criminal statute by the state court. Respondent having failed to show or even suggest such

"extreme circumstances" in this case, petitioner asserts that the state court's definition of the term "to the satisfaction of the jury" should be binding and not subject to review by this Court.

Respondent, again questioning the wisdom of the North Carolina court, charges that the Supreme Court of North Carolina acted in "haste" in removing "constitutionally suspect rules from its law," and that in so doing it "may have overlooked the recent admonitions from this Court of 'the importance of allowing the States to experiment and innovate especially in the area of criminal justice'." (Brief of Respondent, p. 25, citing *California v. Green*, 399 U.S. 149, 171 (1969) (Chief Justice Burger concurring.) Respondent suggests that North Carolina had properly innovated and experimented over one hundred years ago when it adopted rules in homicide cases which effectively shifted the burden of proof to the defendant to satisfy the jury that he acted either in the heat of a sudden passion to rebut the presumption of malice or in self-defense to rebut the presumption of unlawfulness. Petitioner submits that any innovation and experimentation suggested in *California v. Green* should hardly be interpreted as a license to circumvent the prosecution's burden of proof beyond a reasonable doubt in criminal cases by shifting that burden in any way to a defendant.

CONCLUSION

Based upon the foregoing Reply to Respondent's Brief, petitioner submits that this Court should limit its review of the decision below to the question presented by petitioner of the retroactivity of *Mullaney v. Wilbur* in his case.

Respectfully submitted,

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